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6
7 UNITED STATES DISTRICT COURT
8 FOR THE NORTHERN DISTRICT OF CALIFORNIA

9 JUAN MANUEL ANDAZOLA

10 Petitioner,

11
12 vs.

13
14
15 JEANNE S. WOODFORD, Director
of the California Department of
16 Corrections, and Richard Kirdland,
Warden, Pelican Bay State Prison.

17 Respondent.
18

) Case No. C 07-6227 PJH

) MEMORANDUM OF POINTS
) AND
) AUTHORITIES IN RESPONSE
) TO OPPOSITION TO
) PETITION FOR WRIT OF
) HABEAS
) CORPUS

) (28 U.S.C. §2254)

TOPICAL INDEX

INTRODUCTION	1
ARGUMENT	2
I. FAILURE TO DISCLOSE OFFICER SALGADO’S PATTERN OF FALSIFYING POLICE REPORTS AND THE CRIMINAL INVESTIGATION INTO HIS CONDUCT VIOLATED PETITIONER’S FEDERAL AND STATE CONSTITUTIONAL RIGHTS AND REVERSAL IS MANDATED	2
B. Other Prosecution Evidence Did Not Support a Finding that Petitioner Shot Pichardo	4
(1) Griselda Delgado’s testimony	5
(2) The Ochoas’ testimony	7
(3) Juan Carlos Andazola	7
(4) Gina Guardado	8
C. There Is a Reasonable Probability That the Outcome of the Trial Would Have Been Different Had the Defense Known of the Wrongly Withheld Information	9
II. THE STATE COURT UNREASONABLY CONCLUDED THAT THE EVIDENCE WAS SUFFICIENT TO PROVE THAT THE SHOOTING WAS WILLFUL, DELIBERATE, AND PREMEDITATED	11
III. THE STATE COURT UNREASONABLY CONCLUDED THAT THE EVIDENCE WAS SUFFICIENT TO SUPPORT A VERDICT THAT APPELLANT SHOT RAMIREZ	14
IV. CONCLUSION	15

TABLE OF AUTHORITIES

CASES

<i>Barker v. Fleming</i> (9th Cir. 2005) 423 F.3d 1085	10
<i>Brady v. Maryland</i> (1963) 373 U.S. 83	1, 2, 10, 11, 16
<i>Brecht v. Abrahamson</i> (1993) 507 U.S. 619	1
<i>Hayes v. Brown</i> (9th Cir. 2005) 399 F.3d.972	16
<i>In re Winship</i> (1970) 397 U.S. 358	2, 14
<i>Kyles v. Whitley</i> (1995) 514 U.S. 419	2, 9, 11
<i>Napue v. Illinois</i> (1959) 360 U.S. 264	16
<i>People v. Herrera</i> (1999) 70 Cal.App.4th 1456	12
<i>People v. Morris</i> (1988) 46 Cal.3d 23	13
<i>People v. Perez</i> (1992) 2 Cal.4th 1117	13, 14, 16
<i>People v. Sanchez</i> (2001) 26 Cal.4th 834	12
<i>People v. Seel</i> (2004) 34 Cal.4th 535	14
<i>People v. Thomas</i> (1992) 2 Cal.4th 517	13
<i>People v. Wharton</i> (1991) 53 Cal.3d 522	13
<i>Quartararo v. Hanslmaier</i> (2nd Cir. 1999) 186 Fd.3d 91	14
<i>U.S. v. Cuffie</i> (1996) 80 F.3d 514	4
<i>United States v. Bagley</i> (1985) 473 U.S. 667	2, 11

CONSTITUTIONAL PROVISIONS

California Constitution, Article I, § 15	10
United States Constitution, Amendment V	1

STATUTES

28 U.S.C. § 2254	16
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(28 U.S.C. §2254)

**TO: THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA:**

INTRODUCTION

In general, habeas proceedings under section 2254 are reviewed for actual prejudice under the “substantial and injurious effect” standard set forth in *Brecht v. Abrahamson* (1993) 507 U.S. 619. There is no need for harmless error review under *Brecht*, where constitutional error is found under *Brady v. Maryland* (1963) 373 U.S. 83, or where the evidence was insufficient to

sustain the prosecution's burden. (*Kyles v. Whitley* (1995) 514 U.S. 419, 435, ftnt. 9; *Jackson v. Virginia* (1979) 443 U.S. 307, 31, 19.) In the instant case, there was both *Brady* error and the evidence was insufficient to sustain the prosecution's burden. Accordingly, petitioner's convictions should be reversed. (*Kyles v. Whitley*, 514 U.S. 419, 432-34 (1995); *United States v. Bagley* (1985) 473 U.S. 667, 682. (See *In re Winship* (1970) 397 U.S. 358; *Jackson v. Virginia* (1979) 443 U.S. 307, 318-19; U.S.Const. Amend. 5, 14; see also Cal. Const. Art. 1, sec. 15.)

ARGUMENT

I.

FAILURE TO DISCLOSE OFFICER SALGADO'S PATTERN OF FALSIFYING POLICE REPORTS AND THE CRIMINAL INVESTIGATION INTO HIS CONDUCT VIOLATED PETITIONER'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS AND REVERSAL IS MANDATED.

A. The Prosecution's Case Depended Upon Salgado's Testimony.

Respondents acknowledge that shortly after petitioner's trial, Officer Salgado pleaded guilty to five felony counts of falsifying police reports. (Opposition, p. 17; also see Exhibit D, Salgado guilty plea form.)¹ Respondents argue that Salgado's conviction for falsifying police reports in unrelated cases, however, did not constitute *Brady* evidence in the instant case because petitioner's conviction was not dependent upon Salgado's trial testimony and, so, impeachment of Salgado would not have affected the verdict. (Opposition, p. 18.) Nothing could be further from the truth.

Notwithstanding respondents' contention that petitioner's defense focused almost exclusively on Pichardo's conflicting accounts of the shooting

¹Also see Petitioner's Exhibit D-1, criminal complaint, dated September 22, 2004.

1 (Opposition, p. 18.), central to the defense theory was that Javier Salgado was
2 a dishonest cop who fabricated evidence and threatened witnesses.
3 Respondents argue that the prosecutor's reference to Salgado as the
4 "lynchpin" in the case did not mean that Salgado's testimony was
5 indispensable to the prosecution. (Opposition, p. 19.) The record, however,
6 speaks for itself.

7 Respondents' attempt to minimize Salgado's importance to the
8 prosecution and the gravity of his offenses² is transparent. Respondents
9 conveniently ignore the many references to Salgado offered by the prosecutor
10 during his closing arguments. For instance, the prosecutor argued that
11 "Salgado is the lynchpin" and if the jury were to acquit appellant, they would
12 have to believe that Salgado's report had been faked and that Griselda never
13 said those things (about seeing petitioner shoot the victim). (RT 842.) He
14 emphasized this repeatedly, arguing that Salgado was not a "rogue cop" and
15 that in order to believe that Salgado was a liar, they would have to believe that
16 he would write a report to frame somebody and that he would intentionally
17 falsify a report, concluding that "that is totally incredible." (RT 889, 890,
18 892.)

19 The prosecutor sarcastically remarked that according to defense
20 counsel, Salgado "committed a crime by making a false report." (RT 892.)
21 As we now know, Officer Salgado did just that. He pled guilty to *five* felony
22 counts of falsifying police reports. According to the prosecution's own
23

24 ²Respondents dismiss the non-disclosed information as unimportant,
25 characterizing it as Salgado filing false police reports in "unrelated drunk
26 driving cases." In fact, as the record shows, the impeachment evidence was
27 significant. Officer Salgado falsified, not just a few police reports, but 92 of
28 them over a period of three years. That this was considered a serious breach of
police protocol, even amongst the department and the District Attorney's
Office, is obvious from Salgado's prosecution, his eventual termination from
his employment and the District Attorney's dismissal of felony cases pending
at the time of Salgado's guilty plea. (See Petitioner's Exhibits I and I(1).)

1 argument, if the jury believed that Salgado would write a report to frame
2 somebody and that he would intentionally falsify a police report (which are
3 now known facts) they could conclude that Salgado was a liar and acquit
4 petitioner. Had the jurors seen Salgado as we now see him, they would not
5 have believed his testimony. This is particularly so in light of the
6 prosecution's weak evidence and the strong defense evidence of third-party
7 culpability.

8 With proper impeachment, it would have been very easy for the jury to
9 accept Griselda's testimony that Salgado had fabricated a report about what
10 she had told him, thus eliminating the only purported eyewitness account of
11 the shooting. Furthermore, proper impeachment evidence would have
12 bolstered Juan Carlos' repudiation of his videotaped interview, where he
13 implicated petitioner. As such, the verdict below is not worthy of confidence.
14 (*U.S. v. Cuffie* (1996) 80 F.3d 514.) No reasonable jury hearing all of the now
15 available evidence about Salgado's pattern of falsifying police reports over a
16 period of years would vote to convict petitioner beyond a reasonable doubt on
17 the record below.

18 ***B. Other Prosecution Evidence Did Not Support a Finding that***
19 ***Petitioner Shot Picardo.***

20 Respondents argue that other prosecution evidence by "a host of
21 independent witnesses confirmed that petitioner had shot Picardo."
22 (Opposition, p. 18.) This is simply not true. No one testified that they had
23 witnessed the shooting. The only direct evidence linking appellant to the
24 shooting was the unreliable hearsay statement of Griselda Delgado, which
25 came in through Officer Salgado's testimony. By all accounts, Nene had been
26 standing behind Picardo in the garage when he was shot while appellant
27 stood in front of him. (RT 262, 263, 284, 469, 470, 701, 724.) Picardo
28 positively named Nene as the shooter time and time again. (RT 860, 861, 862,

1 875.) None of the witnesses at trial provided solid, credible evidence that
2 petitioner was the shooter.

3 **(1) Griselda Delgado's testimony.**

4 Salgado told the jury that during a two-minute car ride to the police
5 station, Griselda Delgado told him that she had seen petitioner shoot Pichardo.
6 (RT 567-8.) At trial, Griselda denied telling Officer Salgado that appellant
7 shot Pichardo and denied seeing appellant with a gun. (RT 361.) Moreover,
8 Griselda accused Salgado of making repeated threats to her about her
9 testimony.³ (RT 397, 399, 401.)

10 Salgado's proposed theory of the shooting, purportedly based on what
11 Griselda allegedly told him, was that Pichardo saw the gun, ducked and bent
12 down and turned around and was shot in the back by appellant. (RT 587.)
13 This theory, however, did not comport with the facts. Officer Brown rejected
14 a similar theory of the shooting⁴. (RT 703.)

15 Salgado's theory was also inconsistent with Dr. Baker's medical
16 opinion. (RT 447.) The record reveals that, in Dr. Baker's opinion, the bullet
17 was fired from an angle slightly above the left portion of Pichardo's back and
18 went into his body at a straight downward path. (RT 443, 447.) If Pichardo
19 had been bent over, Dr. Baker would have expected the path of the bullet to
20 travel upward, not downward. (*Ibid.*)

21 Respondents argue that although Delgado recanted her report to
22 Salgado at trial, her recantation was suspect for a number of reasons.

23
24
25 ³Griselda said that Salgado threatened that her children could be taken
away from her and that she could go to jail. (RT 581, 374, 385.)

26 ⁴Brown testified that Pichardo had been influenced by phone calls that
27 he received while in the hospital from Nene and that he began to hypothesize
28 other shooting scenarios. "That's when he came up with the conclusion that
Juan Manuel reached up on the shelf, reached around the back and fired. It
would be in an abnormal position which wouldn't make sense. (RT 703).

1 (Opposition, p. 20.) First, because Delgado was an obviously fearful witness.
2 The record, however, does not support that interpretation. Even if it did, that
3 fact would not in any way undermine petitioner's argument that had the jury
4 known of Salgado's past falsification of police reports, they would not have
5 believed his story about what Griselda told him on the way to the police
6 station.

7 Respondents next argue that Griselda's recantation was in part self-
8 contradictory. (Opposition, p. 20.) Griselda admitted that she first told the
9 officer at the scene that she wasn't present at the time of the shooting. (RT
10 351) She explained, however, that she was scared at the time, but later told
11 the police that she was present at the scene. (RT 353.) Again, this has no
12 bearing on whether or not the jury would have believed Salgado's testimony
13 had they known of his previous misdeeds.

14 Respondents contend that Inspector Cromwell refuted Delgado's
15 recantation as did her videotaped interview with Inspector Brown. With
16 regard to the short videotape of Griselda's interaction with Brown, the tape
17 showed Griselda telling Officer Brown that she wanted to tell him something
18 but that she had children at home and would talk apparently only if he
19 promised her safety. (ART interview transcript 8/25/03.) Officer Brown is
20 heard on the tape to say that he cannot guarantee her anything, "you're a
21 witness to a shooting, ok, either you have, [sic] you can prove somebody's
22 innocence or you can prove somebody's guilt." (*Ibid.*) Griselda then asked if
23 she was free to leave. (*Ibid.*; RT 586.) The tape does not further respondents'
24 argument.

25 Neither does Inspector Cromwell's testimony support respondents'
26 position. Cromwell testified that Griselda denied making the statement
27 attributed to her by Salgado before the preliminary hearing. (RT 497, 502.)
28 This conflicted with Salgado's testimony that prior to the preliminary hearing,

1 he heard Delgado reiterate that she had seen appellant shoot Pichardo. (RT
2 497, 502, 581, 590.)

3 **(2) The Ochoas' testimony.**

4 Although petitioner's aunt, Kathleen, testified that in her conversation
5 with appellant, lasting less than a minute, he said something about a shooting,
6 she did not remember his exact words. (RT 423.) On cross-examination,
7 Kathleen admitted that appellant may have said something like "a guy got
8 shot"—an event traumatic enough to account for petitioner's agitated state,
9 but not tantamount to an admission of guilt (RT 423.)

10 Kathleen's husband, Fermin, who spoke very little English, said that
11 appellant had spoken some English to him on the day of the shooting and then
12 switched to Spanish. (RT 371 406, 414.) According to Fermin, appellant told
13 him that he had just shot somebody. (RT 409.) Fermin's admitted animus
14 toward his nephew, however, along with possible language barriers, rendered
15 his testimony highly suspect. (RT 410, 413.)

16 **(3) Juan Carlos Andazola.**

17 In his interview, Juan Carlos told Inspector Brown that he had not been
18 in the garage at the time and had not seen the shooting. Neither did he see
19 appellant with a gun on the day of the shooting.⁵ (ART 5, 15.) Nonetheless,
20 he told the Inspector that Nene did not shoot Pichardo and blamed his cousin
21 instead. (ART 3,18, 36; RT 645.) Juan Carlos told Brown that he overheard
22 appellant tell a friend that he would have shot Pichardo in the face but that he
23 moved too quickly. (ART 24.)

24 Juan Carlos, however, repudiated those statements at trial. He, like

25
26 ⁵Juan Carlos told Inspector Brown that he had seen appellant with a gun
27 a few days before the shooting and that it was wrapped up in "a shirt or
28 something" in the garage. (ART 6.) He also told Brown that he thought that
appellant was putting something away under his shirt when he left the garage.
(ART 15.)

1 Griselda, accused Officer Salgado of dishonesty and of threatening him with
2 incarceration. (RT 639, 652, 654, 658, 660, 665.) Juan Carlos related how
3 Salgado frequently accused him of crimes and threatened him on a daily basis.
4 (RT 637.) He said that Salgado told him that if he did not tell Brown the
5 suggested story, he would get in trouble and would be charged with
6 something. (RT 652, 654.) According to Juan Carlos, Salgado had arrested
7 him before and has tried to scare him. On occasion, Salgado has threatened to
8 fabricate evidence against Juan Carlos⁶. (RT 665.)

9 The circumstances surrounding Juan Carlos' interview were inherently
10 untrustworthy, as were the statements that he made to Officer Brown.
11 Although the videotape itself does not reveal it, Juan Carlos testified under
12 oath at trial that he made up the story at the behest of Salgado and under threat
13 of incarceration. (RB 13; RT 652, 654, 658.)

14 In any event, Juan Carlos admitted that he had not been in the garage
15 during the shooting. (ART 5, 15.) Therefore, he had no firsthand knowledge
16 of who pulled the trigger. Juan Carlos' repudiated statements regarding
17 appellant's behavior after the shooting did not provide sufficient evidence to
18 support the verdict.

19 **(4) Gina Guardado.**

20 Respondents argue that Gina and Juan Carlos approached Brown on
21 April 5 "because they both believed the police were pursuing the wrong man,
22 Nene Boforquez." (Opposition, p. 19.) According to Gina, she learned that
23 Officer Salgado wanted to talk to her a few days after the shooting . (RT
24 542.) She therefore went to the station and provided a statement to the police.
25 (RT 543.) Furthermore, because she was aware of the existence of a warrant
26

27 ⁶According to Juan Carlos, Salgado asked him if he was driving a stolen
28 car when he came to the police station. (RT 652.)

1 for Nene, she and Juan Carlos brought Nene with them to the police station.
 2 (RT 543.)⁷

3 Respondents further contend that Gina said that appellant “behaved
 4 suspiciously when she and Juan Carlos encountered him immediately after the
 5 shooting . . . seemed unusually quiet and he “didn’t have no answers to their
 6 questions.” (Opposition, p. 19.) In fact, Gina’s testimony supported the
 7 conclusion that appellant was *not* acting suspiciously after the shooting.
 8 When she opened the door of the house, she saw people leaving the garage.
 9 (RT 534-5.) When she came outside with Juan Carlos, she saw appellant,
 10 Nene, Marquita, and Mike. (RT 535.) Appellant was not doing anything
 11 unusual, he was just standing there along with everyone else.⁸ (RT 551.)

12 ***C. There Is a Reasonable Probability That the Outcome of the Trial***
 13 ***Would Have Been Different Had the Defense Known of the***
 14 ***Wrongly Withheld Information.***

15 Respondents do not contest that disclosure was required in the case at
 16 bar. Instead they argue only that the evidence was not “material.”
 17 (Opposition, p.18.) That the evidence here was “material,” however, is
 18 manifest. Evidence is “material” if there is a reasonable probability that
 19 disclosure would have led to a different result at trial. (See *Kyles, supra*, at
 20 432-34.) Deciding whether the withheld evidence satisfies this standard
 21 requires a cumulative evaluation. (See *id.*, at 436-38.) Gauging the collective
 22 impact of the withheld evidence requires this court to step back and consider

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 24 ⁷When questioned further, Gina said that once at the station, she tried to
 25 tell a police officer that it wasn’t Nene who “did it.” She indicated that telling
 the police that was part of the reason that she went to the police station. (RT
 544.)

26 ⁸Gina testified:

27 Q: “Did he ever say anything?”

A: no

Q: Did he look unusual in any way?

28 A: No, he just didn’t say anything.” (RT 542.)

1 the strength of the prosecution's case, paying close attention to the critical
2 nature of Salgado's testimony. (See *Barker v. Fleming* (9th Cir. 2005) 423
3 F.3d 1085.) This court must evaluate the impact of the undisclosed evidence,
4 not in isolation, but in light of the rest of the trial record. (*U.S. v. Bowie* (D.C.
5 Cir. 1999) 198 F.3d 905, 912.)

6 As petitioner has already discussed, the case of *U.S. v. Bowie* (D.C. Cir.
7 1999) 198 F.3d 905 is instructive. There the prosecutor sent a letter to
8 defense counsel, post-trial, disclosing that one of the testifying officers was
9 under investigation for his testimony in an unrelated case and that the
10 investigation had begun before the start of the defendant's trial. As the
11 prosecutor failed to disclose evidence affecting the credibility of the
12 government witness, the Court analyzed the facts under due process principles
13 and *Brady*. (*Id.* at 908.) In *Bowie*, the evidence was not deemed "material"
14 because a second officer had largely corroborated the first officer's testimony,
15 diminishing the impact of the impeachment evidence. The court, therefore,
16 found that there was not a reasonable probability that the jury would have
17 acquitted the defendant if the wrongfully withheld evidence had been
18 disclosed. (*Id.*, at 912.)

19 In sharp contrast to the facts in *Bowie*, Salgado's uncorroborated
20 testimony was the glue that held the prosecution's case together. There was
21 no direct evidence of petitioner's guilt. Indeed, even the victim did not
22 believe that it was petitioner who had shot him.⁹ (RT 469, 701, 724, 860, 861,
23 862, 875.) It was only Salgado's testimony that placed the gun in petitioner's
24 hand. There can be no doubt, therefore, that evidence of Officer Salgado's
25 filing false police reports and framing defendants in the past and the

26
27 ⁹Pichardo believed that Nene had shot him. He only began to doubt his
28 belief after receiving phone calls from Nene while he was hospitalized after the
shooting. (RT 305, 455, 456, 676, 702, 724, 863, 872.)

1 investigation into this misconduct was material in the instant case. Although
2 the defense theory centered around Salgado's veracity, the defense lacked
3 impeachment evidence. Information about the many falsified police reports
4 authored by Salgado and the investigation into his misdeeds would have
5 opened up a line of cross-examination that would have been devastating to
6 Salgado's all-important credibility. (Petitioner's Exhibit H.) Given the dearth
7 of credible evidence supporting petitioner's conviction, and the prosecutor's
8 admitted importance of Salgado's testimony, it is reasonably probable that the
9 jury would have acquitted petitioner if the information had been disclosed.

10 To reverse a conviction for a *Brady* violation, it does not have to be
11 more likely than not that the defendant would have been acquitted had the
12 evidence been disclosed. (See *Kyles v. Whitley*, *supra*, 514 U.S. at 434.) A
13 reasonable probability has been described as being somewhat greater than 1%
14 but less than 50%. (*U.S. v. Bowie*, *supra*, 198 F.3d 909.) Clearly in this case,
15 at a minimum, there is a reasonable probability that petitioner would have
16 been acquitted had the defense theory been bolstered by evidence of Officer
17 Salgado's history of fabricating evidence and framing defendants.

18 Under the totality of the circumstances, the verdict in the instant matter
19 is not worthy of confidence, and due process of law entitles petitioner to a
20 new trial. (*United States v. Bagley* (1985) 473 U.S. 667; *Kyles v. Whitley*
21 (1995) 514 U.S. 419, 432-34; *Carriger v Stewart*, *supra*, 132 F.3d 480.).

22 II.

23 **THE STATE COURT UNREASONABLY CONCLUDED THAT THE** 24 **EVIDENCE WAS SUFFICIENT TO PROVE THAT THE SHOOTING** 25 **WAS WILLFUL, DELIBERATE, AND PREMEDITATED.**

26 According to respondents, the Court of Appeal's determination that the
27 shooting was done with premeditation cannot be deemed unreasonable.
28 (Opposition, p. 12.) The Court of Appeal found that "[T]hough a close

1 question,” there was sufficient evidence of premeditation and deliberation to
2 sustain the jury’s finding. (Petitioner’s Exhibit A, p.10, 12.) The court’s
3 conclusion, however, was based largely on its belief that “clear evidence of
4 motive exists.” (*Id* at.12.) This is simply wrong.

5 The Court of Appeal found that the motive for the shooting was that
6 appellant believed that Pichardo had stolen his CD player. (*Ibid.*) According
7 to Pichardo, however, appellant did not seem angry about the CD player. (RT
8 254, 293, 310.) Pichardo never had any negative interactions with appellant.
9 (RT 245.) It was Nene who had been in a foul, disturbed mood and had
10 accused him of stealing a CD player. (RT 721.) Furthermore, it was Nene
11 who suggested that Pichardo leave the garage. (RT 253, 297.) If anyone had
12 a motive to shoot Pichardo, the evidence pointed toward Nene.

13 Furthermore, there was no evidence of any plan to have Pichardo come
14 to appellant’s garage on the day of the shooting or on any other day. The
15 Court of Appeal strained to find evidence of planning in the fact that Pichardo
16 had heard that appellant thought that he had stolen his CD player and decided
17 to go to appellant’s house. (*Ibid.*) There was no evidence, however, that
18 appellant had invited Pichardo to the garage or that appellant had any idea that
19 Pichardo was coming over that day. (*Cf. People v. Sanchez* (2001) 26 Cal.4th
20 834, 843; *People v. Herrera* (1999) 70 Cal.App.4th 1456 [defendants went to
21 the scene to confront rival gang members].) Ramiro Pichardo testified that on
22 the day of the shooting, he had gone to appellant’s garage of his own volition.
23 (RT 237, 290.)

24 Respondents rely on the gun being located in the garage, as did the
25 Court of Appeal, to support evidence of planning. (Opposition, p. 12.) The
26 only evidence that appellant had a gun in the garage, however, came through
27 the untrustworthy testimony of Officer Salgado and the inherently unreliable
28 videotaped statements that Juan Carlos made to Officer Brown under threat

1 from Salgado. That aside, the fact that a defendant used a gun cannot, alone,
2 be viewed as a factor sufficient in itself to show a plan to kill. (RT 568.)

3 In cases where the use of a weapon has been held to support a finding
4 of premeditation and deliberation, there has been further evidence that the
5 defendant took some time to obtain or prepare the weapon before using it. In
6 those cases it was the very fact that defendant took deliberate steps to ready
7 the weapon that was deemed to show sufficient planning to support the
8 inference of premeditation and deliberation. (See, e.g., *People v. Thomas*
9 (1992) 2 Cal.4th 517; *People v. Perez* (1992) 2 Cal.4th 1117; see also, e.g.,
10 *People v. Wharton* (1991) 53 Cal.3d 522, 547 [evidence that defendant either
11 retrieved hammer in advance or went to garage to obtain hammer and kill
12 victim was indicative of planning activity]; *People v. Morris* (1988) 46
13 Cal.3d. 23 [“Defendant’s possession of a weapon in advance of the killing,
14 and his rapid escape to a waiting car moments afterwards, amply support an
15 inference of planning activity”], overruled on other grounds in *People v.*
16 *Sassounian* (1995) 9 Cal.4th 535, 545, fn. 6.)

17 Neither did the way in which the shooting occurred evidence
18 premeditation and planning. Pichardo was shot just once, and the bullet
19 lodged in his back. (RT 443, 447, 449.) Respondents echo the Court of
20 Appeal in citing case law holding that firing at vital body parts, such as the
21 head and neck, can show preconceived deliberation. (Petitioner’s Exhibit A,
22 p.11.) In this matter, however, there was no close-range gunshot to a vital
23 body part. Neither was the shot so particular and exacting as to permit an
24 inference that defendant was acting according to a preconceived design.

25 When considering the sufficiency of the evidence of a state court
26 conviction, “a federal court must look to state law to determine the elements
27 of the crime.” (*Quartararo v. Hanslmaier* (2nd Cir. 1999) 186 Fd.3d 91, 97,
28 cert. denied, 528 U.S. 1170 (2000)). The record in this case does not disclose

1 substantial evidence from which a reasonable trier of fact could find that
2 appellant premeditated and deliberated beyond a reasonable doubt. (*People v.*
3 *Perez, supra*, 2 Cal.4th at 1124.) The state court's decision was, therefore,
4 contrary to, and an unreasonable interpretation of, clearly established federal
5 law. Therefore, petitioner's conviction must be reversed in accordance with
6 federal due process principles. (See *In re Winship* (1970) 397 U.S. 358;
7 *Jackson v. Virginia* (1979) 443 U.S. 307, 318-19; U.S.Const. Amend. 5, 14;
8 see also, Cal. Const. Art. 1, sec. 15.)

9 Furthermore, retrial on this issue is barred by the double jeopardy
10 clause of the United States and California Constitutions. (*People v. Seel*
11 (2004) 34 Cal.4th 535; U.S. Const. Amd. 5; Cal. Const. Art. 1, sec. 15.)

12 13 **III.**

14 **THE STATE COURT UNREASONABLY CONCLUDED THAT THE** 15 **EVIDENCE WAS SUFFICIENT TO SUPPORT A VERDICT THAT** **APPELLANT SHOT RAMIREZ.**

16 The Court of Appeal recognized that critical eyewitnesses to the
17 shooting, including the victim, provided conflicting reports of the events.
18 (Petitioner's Exhibit A, p. 7.) The Court also acknowledged that the victim
19 retreated from his positive identification of Nene as the shooter only after he
20 had received apologetic phone calls from him while in the hospital. (*Id.* at
21 p.8.) Nonetheless, the Court found that other evidence supported the
22 conclusion that appellant fired the shot. (*Ibid.*)

23 The evidence that the Court of Appeal found in support of the jury's
24 verdict was the testimony of Delgado, Juan Carlos and his then-girlfriend,
25 Gina Guardado, and the Ochoas. The only direct evidence linking appellant to
26 the shooting was the unreliable hearsay statement of Griselda Delgado, which
27 came in through Officer Salgado's testimony. (RT 567-8.) Juan Carlos was
28 not in the garage during the shooting. (ART 5, 15.) As has been throughly

1 discussed in petitioner's original points and authorities and in the arguments
2 above, evidence that Delgado saw the shooting and Juan Carlos' testimony
3 about what petitioner said after the shooting were tainted by Officer Salgado,
4 and therefore not believable. The Ochoa's respective testimony was suspect
5 because petitioner was not welcome in their home and there were language
6 barriers to understanding what he might have told them when he came to their
7 house after the shooting. Furthermore, Gina Guardado's testimony did not
8 add substantial evidence to support the theory that petitioner pulled the
9 trigger.

10 The Court of Appeal was wrong in its assessment of the evidence.
11 Based on the record in this case, a reasonable jury could not have found
12 beyond a reasonable doubt that appellant shot Pichardo. Accordingly, due
13 process principles require that appellant's conviction be reversed. (See
14 *Jackson v. Virginia* (1979) 443 U.S. 307, 318-19; U.S. Const. 5th, 14th
15 Amend., Cal. Const. Art. 1, sec. 15.)

16
17 **IV.**
18 **CONCLUSION.**

19 Officer Salgado's conviction for falsifying police reports casts
20 petitioner's case in an entirely new light. The withheld impeachment
21 evidence would have devastated Officer Salgado's credibility and the failure
22 to disclose such evidence violated petitioner's due process rights.

23 Although the defense argued that Salgado was lying, it could not back
24 up its allegations sufficiently to satisfy the jury because it lacked the proof that
25 ultimately surfaced. Petitioner could not effectively cross-examine Officer
26 Salgado because the prosecution failed to disclose important impeachment
27 evidence. Furthermore, petitioner's due process rights were violated when the
28

1 State allowed Officer Salgado to testify falsely. “[A] conviction obtained
 2 through use of false evidence, known to be such by representatives of the
 3 State, must fall under the Fourteenth Amendment.” (*Napue v. Illinois* (1959)
 4 360 U.S. 264; see also *Hayes v. Brown* (9th Cir. 2005) 399 F.3d.972, 981.)

5 Moreover, the state court’s decision was contrary to, and an
 6 unreasonable interpretation of, clearly established federal law as the record in
 7 this case does not disclose substantial evidence from which a reasonable trier
 8 of fact could find that appellant premeditated and deliberated beyond a
 9 reasonable doubt. (*People v. Perez, supra*, 2 Cal.4th at 1124.) When all the
 10 evidence is viewed in the light most favorable to the prosecution, it adds up
 11 only to a suspicion that appellant might have shot Pichardo. Therefore, under
 12 due process principles, appellant’s conviction must be reversed for
 13 insufficiency of the evidence. (See *Jackson v. Virginia, supra*, 443 U.S. at pp.
 14 318, 319; U.S. Const. 14th Amend., Cal.Const. Art. I, sec. 15; *People v. Jones*
 15 (1990) 51 Cal.3d 294, 314; *People v. Johnson* (1980) 26 Cal.3d 557.)

16 Our criminal justice system is based on the principle of fundamental
 17 fairness. “Society wins not only when the guilty are convicted but when
 18 criminal trials are fair.” (*Brady v. Maryland* (1963) 373 U.S. 83, 87.)
 19 Petitioner’s trial was not fair.

20 For all the foregoing reasons¹⁰, Petitioner’s conviction must be
 21 reversed.

22 DATED: February 19, 2008

Respectfully submitted,

23 _____
 /S/

24 BOBBIE STEIN
 25 Attorney for Petitioner
 ANDAZOLA

26 _____
 27 ¹⁰ Respondents discuss pinpoint jury instructions in their opposition.
 28 Petitioner, however, has not raised this issue in this proceeding (Opposition, p.
 13-17.)

DECLARATION OF SERVICE BY MAIL

Re: In re on Habeas Corpus JUAN ANDAZOLA

I, the undersigned, declare that I am over 18 years of age and not a party to the within cause; my business address is 503 Dolores Street, Suite 201, San Francisco, CA 94110. Today, I served a true copy of the attached

Response to Opposition to PETITION FOR WRIT OF HABEAS

CORPUS on each of the following, by placing same in an envelopes addressed as follows:

Attorney General
455 Golden Gate Avenue Rm 11000
San Francisco, CA 94103

Howard Jameson
PO BOX 302
Martinez, CA 94553

Juan Andazola
V-15894-ASU-B-2
Pelican Bay State Prison
Crescent City, CA 95531

Each said envelope was then sealed and deposited in the United States Mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct. Executed on February 19, 2008, at San Francisco, California.

/S/

Bobbie Stein